

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LEONARD ROLLINS, et al.,
Plaintiffs,
vs.
TRAYLOR BROS., INC., and
TRAYLOR/FRONTIER-KEMPER JV,
Defendants.

NO. 2:14-cv-1414-JCC

**PLAINTIFFS' MOTION TO
QUASH SUBPOENAS TO
EMPLOYERS**

**NOTE ON MOTION CALENDAR:
March 31, 2017**

I. INTRODUCTION

Without advance notice, Defendants issued 16 subpoenas to possible employers in the Seattle area, with more to come.¹ These subpoenas are overbroad in multiple ways, and may have an unnecessary chilling effect on future employment. Defendants' counsel indicated all possible employers were included in the subpoena list if they were identified as either a pre-Traylor Bros. or post-Traylor Bros. workplace by any one or more Plaintiff(s). Teller Declaration at ¶3. Each subpoena seeks all records associated with each of the 20 Plaintiffs, with no date restrictions. Exh. A contains the subpoenas and the "advance notice" e-mail sent at the same time. Defendants' overbroad "shotgun" approach means they issued subpoenas for records they *know* the recipient employers will not have. Additionally, the failure to give advance notice violates Rule 45. Finally, personal identifying information was unnecessarily distributed. Substantively, the subpoenas are significantly overbroad, in multiple ways.

¹ Although requested, no further information has been forthcoming about these additional planned subpoenas.

1 First, they are overbroad because they seek all records, even though only limited types of
 2 records have any bearing. Second, they are without any time limitation, even though the
 3 justifications for demanding documents are time-limited, e.g., any relevance to mitigation
 4 would apply only after employment at Traylor Bros. ended. Third, the proffered justifications
 5 do not warrant this invasion of privacy where, for example, regarding mitigation, Plaintiffs have
 6 already provided and agreed to provide tax records and union dispatch records.

7 Defendants also argue that claims of prior experience by some Plaintiffs, which were
 8 made in applications and depositions, should be tested by sending subpoenas to *all* employers.
 9 Assuming the argument is valid, targeted subpoenas should still be limited to pre-employment
 10 time frames, and to workplaces where Plaintiffs actually claimed they had experience, not this
 11 “shotgun” approach to all employers any Plaintiff ever identified.

12 The lack of advance notice (and refusal to withdraw the overbroad subpoenas) required
 13 Plaintiffs’ counsel to issue letters informing the employers that they should not respond, wasting
 14 counsel’s time. Plaintiffs ask the Court to quash the subpoenas, with adequate direction to
 15 Defendants regarding advance notice and specificity of subpoenas that allow the appropriate
 16 scope of discovery to be had. This guidance is necessary as Defendants have indicated they
 17 intend to issue more of the same type of subpoenas. Teller Declaration at ¶3.

18 II. RELEVANT FACTS

19 Defendants argue they need employment records from every place any Plaintiff ever
 20 worked because they need to test mitigation efforts, challenge prior experience claims, and to
 21 locate any patterns of employment issues, such as poor performance, tardiness, etc. Plaintiffs
 22 take the position that this is a fishing expedition. The subpoenas are vastly overbroad.
 23 Defendants were unwilling in CR 37 discussions to cure the failure of advance notice while they
 24 consider Plaintiff’s arguments. Teller Declaration at ¶4.

1 It is concerning that dates of birth and the last four digits of 20 Plaintiffs' social security
2 numbers were distributed to employers (and their employees), most of whom have no
3 legitimate reason to have that information, since the Defendants had no evidence that most of
4 these employers had ever employed the majority or vast majority of the Plaintiffs whose
5 identifying information was so broadly disclosed.

6 **A. Background Facts**

7 Plaintiffs worked for Defendants for varying periods of time. Some applied for work and
8 were "turned around" after being hired on dispatch. They were paid for four hours, generally,
9 and sent away. These "turnaround" workers indicated in depositions and job applications that
10 they had prior experience in tunnels and elsewhere. Defendants appear to claim they were not
11 qualified for the job of "laborer."

12 Other Plaintiffs were hired, worked for days or weeks, then fired for pretextual reasons
13 and/or suffered disparate treatment from Caucasian workers similarly situated. Almost
14 uniformly they were fired for "Inability to Perform the Tasks Assigned to the Level of
15 Competence Required by Management. No Misconduct Involved." See, e.g., Exh. B (layoff
16 slip sample for Leonard Rollins). The prior employment experience of this group has little
17 relevance because Defendants did not make negative judgments about their abilities based on
18 interviews. Instead, Defendants allege they were fired because of their work quality, based on
19 observations of the work. Defendants argue the Subpoenas will result in relevant discovery
20 because these workers may show patterns of behaviors at other employers which will tend to
21 show action in conformity therewith at the Traylor worksite. Teller Decl., at ¶6.

22 A third set of Plaintiffs were hired and worked for months, experiencing racial slurs and
23 disparate treatment on the job. There is simply no relevance of the prior experience levels of
24 these "harassment" workers. Many of these workers continued through nearly the end of the
25

1 project, or quit without constructive discharge, so there is generally also no relevance to
2 mitigation evidence.

3 Some of the workers in each above-identified group were terminated, either by turn
4 around or after a time of employment. Not all are claiming lost wages. For those workers
5 claiming lost wages, there is an obligation to mitigate their damages by seeking other work. For
6 all such workers, tax returns, W-2's, and union dispatch records have been or are being
7 provided.² There is no need for additional "fishing" for mitigation purposes where tax returns
8 and union dispatch records are available.

9 Finally, none of the Subpoenas is limited in any way as to time frame. Each employer is
10 asked about 20 Plaintiffs because one or more Plaintiffs named them in application or
11 deposition. The Subpoenas are not targeted to the arguable, limited legitimate purposes, and are
12 therefore vastly overbroad.

13 **B. Issuance of the Subpoenas Without Advance Notice**

14 Friday March 17, 2017, Defendants served by e-mail Exhibit A, which is an email
15 containing attachments: A cover letter allegedly providing advance notice, along with 16
16 subpoenas.³ Within an hour, Plaintiffs objected that the Subpoenas were overbroad, and that
17 they should not be issued until there was an opportunity to discuss them. Exhs. C-E (E-mail
18 exchange beginning Friday March 17). Defendants informed Plaintiffs that in fact they had
19 already been sent to FedEx, despite the requirement of advance notice, but that Defendants
20 would not take responsibility to recall them.⁴ *Id.*

21
22 ² A few workers did not retain tax returns, and Plaintiffs' counsel are obtaining them directly from the IRS.

23 ³ Actually half the Subpoenas were attached to a second "part 2" e-mail with no other substance.

24 ⁴ Defendants indicate that Plaintiffs have issued Subpoenas in this matter with similar advance notice, or less. If
25 so, it may be that Plaintiffs should be giving more notice and will do so in the future. That does not cure the
problem here. Moreover, if nearly simultaneous notice and service did occur in those prior cases, then, if
Defendants *had objected* to any of those Subpoenas, Plaintiffs would presumably have acted to halt them while
the dispute was outstanding. In other words, it appears to the undersigned that is not only the lack of adequate
notice which matters, but more significantly the refusal to take action when the objection is lodged. Guidance
from the Court would be welcomed on the meaning of "advance notice."

1 Plaintiffs therefore identified addresses, phone and fax numbers where possible, and
 2 contacted the HR departments of these 16 employers to voice their objections. Defendants were
 3 copied on the letters, which were sent by mail and fax. Teller Decl. at ¶9.

4 **C. Concerns regarding privacy and retaliation have been recognized in this case**

5 The discrimination investigator hired by Sound Transit is Marcella Fleming Reed. Her
 6 firm identified that some workers in this matter were concerned about retaliation. Similarly, at
 7 the outset of the case, class members asserted concerns about retaliation by other employers.
 8 The Court recognized this concern in a prior Order. Dkt. 71, at 10:24-12:10.

9 This “shotgun” approach, without advance notice to allow pre-issuance “meet and
 10 confer” or discovery motions practice, has the exact effect these workers feared. In addition it
 11 improperly and overly broadly disclosed private identifying information to non-employers of
 12 these Plaintiffs. Defendants’ approach violated Rule 45 in letter and spirit, and may have
 13 caused harm.

14 **III. AUTHORITY OF LAW**

15 The Federal Rules of Civil Procedure, Rule 26(b) limits the scope of discovery to matters
 16 relevant to the subject matter involved in the action and reasonably calculated to lead to the
 17 discovery of admissible evidence. The trial court may also limit discovery if it determines “the
 18 discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other
 19 source that is more convenient, less burdensome, or less expensive” CR 26(b)(1)(A).

20 The Rules also provide that “[u]pon motion by a party or by the person from whom
 21 discovery is sought, and for good cause shown, the court ... may make any order which justice
 22 requires to protect a party or person from annoyance, embarrassment, oppression, or undue
 23 burden or expense.” Fed.R.Civ.P. 26(c). The trial court may order “that the discovery not be
 24 had” at all, or “that certain matters not be inquired into, or that the scope of the discovery be
 25 limited to certain matters” Fed.R.Civ.P. 26(c)(1)(4).

A. Plaintiffs have privacy interests related to their employment and records thereof

In *Woods v. Fresenius Medical Care Group of N.A.*, 2008 WL 151836, 2008 U.S. Dist. LEXIS 3756 (S.D. Ind. 2008), the plaintiff in a race discrimination sought to quash a subpoena to her former and current employers, arguing that she had a privacy interest in the documents sought in the subpoena and that the documents were irrelevant to the claims and defenses in the case. The court granted the plaintiff's motion to quash the subpoena. The court noted that the plaintiff had a "legitimate interest in protecting the confidentiality of much of the information contained in her employment records and also maintaining her relationship with her current employer." *Id.* *3. The court held that the plaintiff had put only her employment with the defendant at issue, not her work with any other employer:

[A]n employment discrimination plaintiff does not open her entire work history up for discovery by the defendant as a matter of course; rather, the defendant must demonstrate a specific reason why the information is relevant to the particular claims and defenses in the case at hand. In other words, absent a showing that the subpoenas are reasonably calculated to lead to the discovery of admissible evidence, the Defendant is simply embarking on the proverbial fishing expedition, and the theoretical potential relevance of any information obtained by such discovery is outweighed by the interests of the plaintiff. ..

Woods, 2008 U.S. Dist. LEXIS 3756 *5 (emphasis added). The *Woods* court correctly held that there was no basis to allow the Defendant "fish[ing] around" to see what it might uncover. *Id.* See also *Maxwell v. Health Center of Lake City*, No. 3:05-CV-1056-J-32MCR, 2006 WL 1627020 at *2 (M.D.Fla. June 6, 2006) (quashing subpoena because "Personnel files and records . . . are confidential in nature and . . . in most circumstances, they should be protected from wide dissemination.").

B. The Subpoenaed Records are Not Calculated to Lead to Admissible Evidence

Records from Plaintiff's former employers are inadmissible as character evidence under Federal Rule of Evidence 404, and they are not relevant under any other rule. See, e.g., *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507 (D.C. Cir. 1995) (holding that trial court's

admission of evidence of plaintiff's conduct at prior employer was error); *Singletary v. Sterling Transport Company, Inc.*, 2012 WL 5449687 (E.D.Va. 2012) ("the Court will not allow Defendant to search wholesale through Plaintiffs previous employment records without first demonstrating some legitimate, good faith basis for Plaintiffs lack of credibility. To hold otherwise would be to sanction 'virtually no limits on discovery once a party invokes the mantra of' credibility' as the basis for a discovery request.'"); *Sanders v. Dalcraft, LLC*, 2009 WL 1392602, at *2 ("Without some evidence to suggest that plaintiff was disciplined by her former employers for conduct similar to the reasons proffered by defendant for her termination, defendant is not entitled to these confidential employment records in hopes of uncovering some evidence that may possibly be used against plaintiff at trial"); *Premier v. Corestaff Servs., LP.*, 232 F .R.D. 692, 693 (M.D. Fla. 2005) (refusing to require production of employer's employment records pursuant to an over broad subpoena as overly intrusive and unnecessary where defendant failed to provide any reason to suspect the plaintiffs credibility); *Slipchenko v. Brunel Energy, Inc.*, 2013 WL 4677918, No. H-11-1465 (SD Texas 2013) ("The present record also fails to provide a sufficient basis to conclude that the broad categories of information sought about Slipchenko's employment history are relevant to her credibility").

In *Chamberlain v. Farmington Sav. Bank*, 2007 U.S. Dist. LEXIS 70376 (D. Conn. 2007), an age discrimination case, the defendant-employer contended that it terminated the plaintiff for performance reasons, and sought to serve subpoena on the plaintiff's former employers to obtain information pertaining to the plaintiff's performance history. The court noted that the performance information was "neither relevant nor admissible" for the purpose of showing that the plaintiff performed poorly in his position with the defendant, because it was the plaintiff's performance *with the defendant* that was at issue. As do the Defendants in this case, the defendant in *Chamberlain* sought the evidence of the plaintiff's performance history in order to show the plaintiff has a "propensity for certain performance deficiencies." The court

1 held that such evidence was specifically *inadmissible* under FRE 404(a). The court granted the
 2 plaintiff's motion to quash the subpoena. *See also Zubulake v. UBS*, 382 F.Supp.2d 536 (S.D.
 3 N.Y. 2005) (excluding evidence of performance with prior employer in sex discrimination case
 4 because inadmissible character evidence pursuant to FRE 404(a), and noting that "no matter
 5 how defendants try to frame their intended use - whether to rebut plaintiff s contention that she
 6 was not insubordinate and uncooperative or whether to prove that she was insubordinate and
 7 uncooperative outright - they are seeking to introduce inadmissible propensity evidence" and
 8 that none of the exceptions of FRE 404(b) applied); *Paananen v. Cellco P'ship*, 2009 U.S. Dist.
 9 LEXIS 130215, 2009 WL 2057048 at *7 (W.D. Wash. July 14,2009) ("Generally, employment
 10 records from separate employers are not discoverable due to their highly private nature absent a
 11 specific showing by a defendant as to their relevance."); *Bickleyv. Schneider Nat., Inc.*,
 12 F.Supp.2d. 2011 WL 1344195 at *3 (N.D. Ca. 2011) (the employee's personnel records and
 13 employment information were protected under both the state and federal constitutional right to
 14 privacy - "it could reasonably be inferred that Defendant's subpoenas were intended to harass
 15 Plaintiffs and constitute little more than an abuse of the discovery process"). Insofar as they
 16 seek evidence of misconduct (the real reason for these subpoenas), there is no valid basis for
 17 them.

18 Any information about Plaintiffs' subsequent employers and earnings potential has
 19 already been provided. Tax records for most Plaintiffs (perhaps all, by the time this matter is
 20 heard) have been provided, and counsel is working to obtain the remaining few from the IRS
 21 directly. Defendants are aware of this. Teller Decl. at ¶8. Union dispatch records have also
 22 been provided from Plaintiffs and by the Laborers and Cement Masons unions pursuant to other
 23 prior Subpoena(s). The mitigation argument does not justify any subpoenas where other records
 24 have been provided, and certainly does not justify subpoenas to prior employers.

1 Defendants have not articulated any legitimate basis to demand these records, particularly
2 in this overbroad manner.

3 **C. The subpoenas are overbroad, and constitute a “fishing expedition.”**

4 The subpoenas in this case seek *all* documents concerning Plaintiffs in the possession of
5 any prior employers and current employer of *any* Plaintiff. They command production of:

6 the following documents, electronically stored information, or objects that *refer or*
7 *relate directly or indirectly in any way to the following individuals* [List of 20
8 Plaintiffs] specifically including without limitation all documents that refer or relate
9 to date(s) of dispatch, hire and separations; reasons for separation; positions and
10 responsibilities; performance; and benefits and compensation. Responsive
11 documents include but any not limited to: Job applications, personnel file(s), leave
12 files, employee relations files, payroll records, benefits records, performance
13 evaluations, discharge and discipline records, correspondence, memoranda,
14 electronic mail, medical records, workers' compensation records, complaint files,
15 grievance records, dispatch records, resumes, interview notes, contracts, and
16 agreements.

17 Exh. A, at p. 5. In other words, Defendants make no effort to target the specific information
18 which may be relevant to the claims in this case.

19 Courts have consistently held that requesting virtually all of a plaintiff's employment
20 record is overly broad and thus improper. See, e.g., *Richards v. Convergys Corp.*, 2007 U.S.
21 Dist. LEXIS 9131, 2007 WL 474012, at *4-5 (D. Utah Feb. 6, 2007) (quashing overbroad
22 subpoena duces tecum directed to the plaintiffs former employer that sought “all documents in
23 your possession or control regarding the employment of” the plaintiff); *Barrington v. Montage*
24 *IT, Inc.*, 2007 U.S. Dist. LEXIS 90555, 2007 WL 4370647, *2 (S. D. Fla. 2007) (holding that
25 records from former employers had no relevance to issues in case and quashing subpoenas
requesting all employment documents as overly broad); *Lewin v. Nackard Bottling Co.*, 2010
U.S. Dist. LEXIS 123738, 2010 WL 4607402, at *1 (D. Ariz. Nov. 4, 2010) (quashing subpoena
requesting plaintiffs complete personnel records from former employers as over broad);

1 *Maxwell v. Health Ctr. of Lake City, Inc.*, 3:05-CV-1056-J-32MCR, 2006 U.S. Dist. LEXIS
2 36774, 2006 WL 1627020, at *3 (M.D. Fla. June 6, 2006) (same).

3 The Defendant apparently believes that it may request virtually any information about
4 Plaintiffs under the pretext that there may be some evidence possessed by a former employer or
5 current employer which it might find useful. “District courts need not condone the use of
6 discovery to engage in ‘fishing expedition[s]’ *Rivera v. Nibco, Inc.*, 364 F. 3d 1057, 1072
7 (9th Cir. 2004). *See also Cuomo v. Clearing House Ass’n, LLC*, 129 S.Ct. 2710, 2719
8 (2009)(“Judges are trusted to prevent ‘fishing expeditions’ or an undirected rummaging through
9 bank books and records for evidence of some unknown wrongdoing”); . . *Bartholomew v. Unum*
10 *Life Ins. Co.*, 579 F. Supp. 2d 1339, 1342 (WD Wash. 2008)(J. Pechman) (“Further damaging
11 Plaintiffs position here is that in the final analysis her discovery request is little more than a
12 fishing expedition”); *Johnson v. US Bancorp, Dist. Court*, C 11-020 1 0 RAJ (WD Wash. 20
13 12)(“discovery should not be used as a means to conduct a ‘fishing expedition,’ “); *Inst. for*
14 *Wildlife Prot. v. Norton*, 337 F. Supp. 2d 1223,1226 (WD. Wash. 2004) (“[D]iscovery may not
15 be used to conduct a fishing expedition in hopes that some fact supporting an allegation will be
16 uncovered”).

17 The court should “not ... condone the use of discovery to pursue a vague hope that some
18 deleterious or illegal conduct will be uncovered.” *Kearney v. Boeing*, No. 14-1011 RSL, Dkt
19 24, p. 2 (W.D. Wash. 7/7/15) (“Defendant may not, however, engage in a fishing expedition
20 seeking evidence of other, unknown, and unsuspected malfeasance in plaintiff’s employment
21 records.”) This “shotgun” approach is not reasonably calculated to lead to discovery, but rather
22 is blasted out in hopes of obtaining some damning record from *somewhere*. It should not be
23 condoned.

24 **D. Failure to Comply with Rule 45**

25 Fed.R.Civ.P. 45(a)(4) requires advance notice:

Notice to Other Parties Before Service. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, *then before it is served on the person to whom it is directed*, a notice and a copy of the subpoena must be served on each party.

Defendants issued the subpoenas and set them out for service around the same time as counsel e-mailed them to Plaintiffs. Exh. C. Plaintiffs' counsel quickly responded, expressing objection, but was informed that the subpoenas had already been issued. Further, despite the objection, Defendants made no effort to delay, stop service, or withdraw the Subpoenas. This conduct violates the letter and/or spirit of the advance notice requirement.

If Defendants had acted reasonably, they would have given notice adequate to consider Plaintiffs' objections before service (at least a few hours or days), or would have called back the Subpoenas after issuance and before service because of Plaintiffs' objections, so that the concerns could be addressed and resolved or the Court could rule. Instead, they went ahead with costly service and required Plaintiffs' counsel to waste time contacting recipients. Further, service without withdrawing the Subpoenas had the chilling or retaliation-producing effect that Plaintiffs' feared. Counsel indicated it has also had the intended effect, in that about a third of the employers have responded already as of this writing. This practice means there was no advance notice.

The Court should consider whether terms or a sanction is appropriate, and give guidance on the practical meaning of “advance notice” in Rule 45.

IV. CONCLUSION

Plaintiff's Motion to Quash the subpoenas should be granted. They are vastly overbroad, and not reasonably calculated to lead to the discovery of admissible evidence as well as duplicative of discovery already obtained regarding mitigation. As such they are harassing to the Plaintiffs where Plaintiffs have already expressed fears of retaliation by other parties for pursuing this matter.

1 Given that the Defendants indicated their intention to issue additional similar subpoenas,
2 guidance from the Court would be valuable regarding what process is appropriate, and whether
3 Defendants need to more narrowly target the subpoenas to avoid causing employment problems
4 or burdening third parties.

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6
7 DATED this 23rd day of March, 2017.

8 By: /s/Gregory A. Hitzel

9 By: /s/ Stephen Teller

10 By: /s/Beth Touschner

11 Stephen Teller, WSBA #23372

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2017, I caused to be electronically filed the foregoing PLAINTIFFS' MOTION TO QUASH SUBPOENAS TO EMPLOYERS with the Clerk of the Court using the CM/ECF system, and thereby sent notification of such filing to the Defendant through the following attorneys of record:

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DATED this 23rd day of March, 2017.



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**PLAINTIFFS' MOTION TO QUASH
SUBPOENAS TO EMPLOYERS - 13
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